BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAMELA D. JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,352
TOPEKA COMMUNITY HEALTHCARE	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the April 25, 2012 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on August 7, 2012.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Kevin M. Johnson, of Overland Park, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Member Gary R. Terrill has recused himself from this appeal. Accordingly, Jeffrey King, of Salina, Kansas, has been appointed as a Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant's injury was the result of the July 5, 2009 accident and her impairment was limited to the shoulder. Based on the opinion of Terrence Pratt, M.D., the ALJ awarded claimant a 7 percent permanent partial functional impairment to the left upper extremity at the level of the shoulder. The ALJ also found that since claimant is

entitled to only a scheduled impairment, respondent is entitled to a credit for the $5,220.52 in temporary partial disability benefits paid to the claimant.

Claimant requests review arguing that she is entitled to a 5 percent whole person functional impairment and a 61.25 percent work disability because she sustained a neck and back injury which resulted in a whole person impairment to her cervicothoracic spine.

Respondent contends that the Board should affirm the ALJ's determination that claimant sustained no neck injury as a result of her employment with respondent, and should further find that claimant did not sustain any injury while working for respondent as claimant has failed to sustain her burden that she suffered personal injury by accident in the course of her employment. Respondent also contends that claimant's current symptomatology is a natural and probable consequence of her earlier injury during her employment with Providence Living Center in March 2008. If the Board finds that claimant did sustain injury in the course of employment, respondent argues that any permanent partial disability compensation should be limited to the left shoulder.

Claimant's issues

1. Whether Dr. Pratt's opinion should be disqualified and stricken from the record;
2. Nature and extent of claimant's disability.

Respondent's issues

1. Whether claimant met with personal injury by accident;
2. Whether claimant's alleged accidental injury arose out of and in the course of her employment;
3. Nature and extent of disability;
4. Overpayment of temporary partial disability benefits;
5. Whether claimant is entitled to future and unauthorized medical treatment.

FINDINGS OF FACT

Claimant began working for respondent on July 1, 2009, as a medication aide. Claimant was hired as a full-time employee making $10 an hour plus an extra 50 cents an hour shift differential for working 10:00 p.m. to 6:00 a.m. Claimant testified that she would work seven days straight and then have two days off.

On July 5, 2009, claimant's fifth day of work, she and a charge nurse named Doris[1], were working on their own for the first time. Claimant was supposed to pass out

[1] Her name could be Delores, this person was identified both ways in this record.

medications to the residents and Doris was in charge of the medication orders. But because they were the only ones working in their area Doris handled all of the medication duties and claimant handled all of the floor work, which involved assisting residents with toileting needs, bed changes etc.[2] Claimant testified that she began to feel pain in her neck, back and left shoulder after assisting the residents with their needs and believed she injured those areas on that date.

Claimant reported her pain to Doris and was asked if she wanted to quit. Claimant took that to mean because it was just the two of them she either needed to leave or continue to work in pain. Claimant finished her shift and returned to work the next day without seeking medical treatment. Claimant thought that she had temporarily pulled something and it would get better on its own.[3] She testified that Doris no longer works for respondent because she was fired for not filing an incident report when claimant's injury was reported to her.

Claimant testified that within ten days of her injury she left a note for Janet, the Director of Nursing, reporting that she had hurt her arm while working and she would appreciate extra help during her shift.[4] Janet left instructions with the third shift to help out with the floor rounds. Claimant also asked Charlene, the second shift charge nurse, to make sure that her staff did their work before she got there so she wouldn't have 60 beds to change all by herself.[5] Claimant testified that she was hired to be a medication aide and was performing nurses aide work instead.

Between July 5, 2009 and August 3, 2009, claimant missed four shifts. On July 27, 2009, claimant reported to the St. Francis emergency room with arm pain. She was provided analgesics and anxiety medications. On August 3, 2009, claimant again sought medical treatment at the St. Francis emergency room after she couldn't get out of bed. Claimant tried to return to work on August 4, 2009, and was told that she needed a note from the doctor releasing her and information regarding any restrictions that were applicable.

Claimant met with Travis R. Oller, D.C., on August 7, 2009. The history provided to Dr. Oller indicated a work-related injury on July 5, 2009, with increased pain in claimant's left shoulder, neck and left upper back. Claimant's self referral to the ER was noted. Claimant described sharp and stabbing neck pain, and left shoulder and shoulder blade pain. Claimant was scheduled for chiropractic treatments for three weeks, three times per

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[2] P.H. Trans. (Dec. 1, 2009) at 8-9.

[3] P.H. Trans. (Dec. 1, 2009) at 10-11.

[4] P.H. Trans. (Dec. 1, 2009) at 11.

[5] P.H. Trans. (Dec. 1, 2009) at 12.

week. Dr. Oller also recommended claimant see an orthopedic surgeon for her shoulder complaints, and that she get an MRI of the left shoulder. He assigned claimant temporary restrictions of no repetitive lifting over 25 pounds, no lifting over shoulder level, no lifting over head level and no unassisted patient transfers. Claimant presented those restrictions to Janet, and was told that if she wasn't released with no restrictions within 30 days, there was no work for her. Claimant testified that she simply wanted to do the job she was hired for, which was passing out medications.

Claimant presented to Dr. Oller, on several occasions, with complaints of left shoulder, neck and upper back pain. As of February 17, 2010, claimant still complained of left shoulder, cervical and upper back pain.

Claimant's treatment history with Dr. Oller is significant. She was severely injured on March 3, 2008, while working for Providence, in Topeka, Kansas. At that time she and two other staff members were attacked by a resident with a mop handle. Claimant was hit on her left hand and punched in the face. Claimant suffered injury to her left pinky finger, neck and low back as a result of the attack by a resident and being scrunched underneath a desk in the process.[6] Claimant testified that she is not claiming a new injury to her neck and back from the July 5, 2009 incident, but she states that the incident did make the pain worse. She received treatment for the pinky finger with Dr. Oller. Two weeks before going to work for respondent, claimant was given work restrictions for the pinky finger. Claimant denies any prior shoulder injuries. She was seen by Dr. Oller on March 31, 2008, and treated for neck and low back complaints.

When claimant was examined by Dr. Oller on June 19, 2009, eleven days before beginning work for respondent, claimant continued to complain of ongoing neck, low back and upper back pain, with numbness into both of her arms. She also complained of tingling into her calves bilaterally. Her pain on that date was from 5 to 8 on a scale of 1-10. As of that date, claimant still complained of loss of motion and loss of strength in her left hand, more specifically the little finger, pain, spasm, loss of motion and cervical radiculopathy in her cervical spine and pain, spasm and loss of motion in her thoracolumbar spine. Claimant did not describe left shoulder pain at that time, nor at any time from the March 3, 2008 incident. Claimant settled her workers compensation claim with Providence in December 2009 for $6,000, although the basis for this settlement is not clarified in this record. Future medical treatment was not included in the settlement.

At the preliminary hearing, on December 1, 2009, claimant described the pain in her left shoulder as excruciating, like being stabbed in the shoulder blade. She described it as constant to the point her arm would go numb. She also described the pain in her neck as constant, which made it difficult to hold her head up or put it downward. Claimant also reported pain in her back.

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[6] P.H. Trans. (Dec. 1, 2009) at 20.

Before working for respondent, claimant worked for Aldersgate, a retirement home as a medication aide and bath assistant. Her last day of work for Aldersgate was in June of 2008. She did not work anywhere else for about a year until she went to work for respondent. Claimant left Aldersgate because of transportation issues. Before that claimant worked for McCrite Plaza Retirement Community, another retirement home, as medication aide. And before that claimant worked for Providence also as a medication aide.

At the preliminary hearing, on August 11, 2010, claimant testified that her back and neck pain had resolved, but that she continued to have pain in her left shoulder.[7] She also complained of frequent headaches. The more she used her arm the more headaches she had. Claimant does most of her work with her right hand. She testified that her headaches are less frequent when she exercises regularly and avoids repetitive work.

Claimant received treatment for her neck with Dr. Pratt. Claimant denied having any prior symptoms in her neck before the accident with respondent. She testified that the stiffness she has in her neck gets worse when she does activities. She has problems turning her neck from left to the side or from up to down, and continues to have pain and swelling in her shoulder, which she considered more significant than the pain in her neck.[8]

Claimant last worked for respondent on August 15, 2009, when she was fired because she was not able to come back to work without restrictions. On November 28, 2010, claimant began working for Long John Silver's about 35 to 38 hours a week at $7.25 an hour. Claimant stopped working for Long John's Silver's on October 15, 2010, after she was fired for attendance issues.

On October 15, 2010, claimant began working for Resource Center for Independent Living (RCIL) cleaning at night, making $22 an hour. As of the Regular hearing, claimant continued to work for RCIL and was looking for alternative work and had applied online for a job with the lab at the VA.

Claimant testified to having spasms in her low back prior to the incident on July 5, 2009. She was assigned a 15 percent impairment to the cervical spine and a 5 percent impairment to the back by Dr. Oller. Strangely enough, claimant also testified that she had no symptoms when she began working for respondent.[9]

Claimant was asked to explain when her neck pain started and she testified:

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[7] P.H. Trans. (Aug. 11, 2010) at 7.

[8] R.H. Trans. at 16.

[9] R.H. Trans. at 35.

> Q. When did this neck pain come back because it was gone, at least temporarily, as of August 11, 2010. We're about a year and a month or two after that date where you testified you weren't having that pain. When did you begin having neck pain again?
>
> A. When I started working at Reser's.
>
> Q. Were you doing anything spectacular at Reser's or out of the ordinary or just using your neck in general was bothering you?
>
> A. Repetitive hand movements.
>
> Q. So using your hands and motions of your hands caused your neck pain to recur?
>
> A. Yes. And holding my neck down.[10]

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination, on April 12, 2011. Claimant's complaints were tension in the left shoulder radiating into the neck and occasional tingling in the fingers on the left. The history provided to Dr. Murati discussed an injury on July 5, 2009, to claimant's left shoulder. The history contains no mention of the cervical spine or the lumbar spine associated with the injury date of July 5, 2009.

Dr. Murati examined claimant and diagnosed myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinals, and left carpal tunnel syndrome with referring pain into the left shoulder. He opined that this diagnosis was related to the work-related accident on July 5, 2009, during claimant's employment with respondent. He had no records to indicate that claimant's injury to her neck was preexisting, although claimant did advise Dr. Murati of the 2008 accident. Dr. Murati felt that claimant's carpal tunnel syndrome was the result of the repetitive duties of her job as a medication aide.

Dr. Murati assigned permanent restrictions of no climbing ladders, no crawling, no above shoulder work with the right or left, no heavy grasping greater than 40 kg with the left, no lifting, carrying, pushing or pulling with the right or left greater than 20 pounds, frequently 10 pounds, frequent hand controls with the left, occasionally repetitive grasp or grab with the left, no work more tan 18 inches from the body with the right or th left, avoid awkward positions of the neck, use wrist splints while at home and work on the left, no use of hooks or knives with the left, no use of vibratory tools with the left.[11] He assigned claimant an 11 percent whole person impairment (5 percent whole person impairment for

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[10] R.H. Trans. at 40.

[11] Murati Depo., Ex. 2 at 4 (Release to Return to work dated Apr. 12, 2011).

the myofascial pain and 10 to the left upper extremity (6 percent whole person) for carpal tunnel syndrome.[12]

Dr. Murati reviewed the task list of Dick Santner and opined that out of the 31 tasks identified, claimant has lost the ability to perform 19 for a 61 percent task loss.

Dr. Murati opined that claimant would need treatment in the future for the carpal tunnel syndrome and the myofascial pain syndrome. He testified that claimant told him about her injuries from 2008 when she was attacked, but she did not go into great detail.

Claimant was referred by the ALJ to board certified orthopedic surgeon Terrence Pratt, M.D., for an IME on October 12, 2010. Claimant's complaints included discomfort in her left shoulder with referred pain into the hand, related to an event at work in July 5, 2009. Claimant reported that the pain in her shoulder goes down into her left upper extremity and down to her hand in the form of numbness. Her neck complaints had decreased and her back complaints were limited to the left shoulder blade.

Dr. Pratt examined claimant and her prior medical records and opined that she had left shoulder syndrome without significant findings of diagnostic testing, a history of chronic cervicothoracic syndrome, history of anxiety and depression, and history of a left little finger fracture. Dr. Pratt opined that claimant's shoulder issues were due to the July 5, 2009, incident while at work for respondent. Treatment was recommended, but no impairment rating was issued at the time.

On August 11, 2010, the ALJ issued a Preliminary Hearing Order to Dr. Pratt requesting a diagnosis, recommendations, an opinion on whether claimant was at MMI and claimant's permanent impairment of function. The parties were to furnish Dr. Pratt with medical reports but added contact required the approval of the ALJ. Dr. Pratt issued his report to the ALJ on October 12, 2010.

Dr. Pratt was contacted on January 3, 2011, by Sheila Wilson, of Coventry Healthcare, requesting that he see claimant for the purpose of obtaining a release. The involvement of Coventry Healthcare in this matter is not explained, as respondent's insurance company was identified by the Division of Workers Compensation as Ace American Insurance Company (Ace).

On March 4, 2011, Dr. Pratt issued his final diagnosis of left shoulder syndrome with a history of chronic cervicothoracic syndrome. Dr. Pratt noted that claimant had been provided treatment through an alternative physician and was returning for further assessment. He recommended claimant continue with physical therapy and assigned a seven percent impairment to the upper extremity at the shoulder. He didn't assess any

[12] Murati Depo., Ex. 2 at 3 (Dr. Murati's Apr. 12, 2011 report).

impairment to the cervical or cervicothoracic spines in his report, but testified that it would be five percent to the body as a whole. It remains his opinion that this was not related to the July 2009 incident.[13]

Dr. Pratt opined that the only symptoms related to the July 5, 2009 incident were those to the shoulder. Claimant reported that her cervical symptoms had decreased and she did not complain about her back other than pain isolated to the shoulder blade on the left. Treatment, including physical therapy and nonsteroidal agents for the shoulder were recommended.

Claimant objected to the impairment opinion of Dr. Pratt when before the Board, arguing that the parties had been admonished by the ALJ to avoid contact with the doctor absent a court order. This objection was referenced in the body of claimant's submission letter to the ALJ and her brief to the Board, but was not discussed at the regular hearing, nor included in the judges notes from the pre-hearing settlement conference. Additionally, in claimant's submission letter, the dispute regarding the impairment opinion of Dr. Pratt was not listed as an issue. The Award of the ALJ lists the deposition of Dr. Pratt, with exhibits, as being part of the record. Claimant's objection to the rating opinion of Dr. Pratt was not listed as an issue, and was neither discussed, nor decided in the body of the Award.

Claimant met with Dick Santner, a vocational counselor, on August 2, 2011. Mr. Santner spoke with claimant and came up with 31 tasks that claimant has performed over that last 15 years. He also noted claimant's wages for Long John Silver's and Reser's.

Claimant also met with Michelle Sprecker, a vocational counselor, for a vocational assessment. Ms. Sprecker identified 40 tasks that claimant has performed over the last 15 years. Ms. Sprecker also noted claimant's wages post-injury. Ms. Sprecker opined in her report that claimant retains the ability to return to work as a CMA or CNA with the respondent or in a similar position earning a comparable wage.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[14]

[13] Pratt Depo. at 50.

[14] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[15]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[16]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[17]

The Board will first determine the record in this matter. Claimant's objection to Dr. Pratt's impairment opinion was not listed as an issue in her submission letter to the ALJ. It was only briefly referenced in the body of the submission letter. It was not raised at the regular hearing nor is it contained in the pre-hearing settlement notes of the ALJ. It is not listed as an issue in the Award and the ALJ does not discuss or decide the dispute regarding the inclusion of Dr. Pratt's impairment opinion in the Award. Additionally, it is not clear from this record which entity actually requested the impairment opinion from Dr. Pratt. Sheila Wilson is apparently an employee of Coventry Health. But the insurance company insuring respondent in this matter is Ace. Whether there is a business connection between Coventry Healthcare and Ace is never revealed in this record. This makes it impossible to determine whether the original order of the ALJ has been violated in some fashion.

The Board notes that the Order of the ALJ, referring claimant to Dr. Pratt for an IME contemplates a possible functional impairment opinion once claimant reaches MMI. At the time of claimant's return to Dr. Pratt, claimant had completed most of the treatment regimen with the treating physician. The referral, apparently necessitated by the temporary

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[15] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[16] K.S.A. 44-501(a).

[17] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

absence of the treating physician, was for the purpose of obtaining a functional impairment opinion, something contemplated by the ALJ at the time of the original order. The Board finds that claimant's possible objection to the impairment opinion of Dr. Pratt should be denied. The medical reports of Dr. Pratt, both for the IME and for the impairment opinion are included in this record and have been considered by the Board.

Respondent contends that claimant has failed to prove that the accident on the alleged date actually happened. Yet respondent provides no evidence to contradict claimant's description of the incident involving the development of pain as she was performing her job duties while working with respondent's clients. It is clear that claimant had pre-existing physical problems stemming from the work-related assault while working for Providence. But claimant testified to an increase in pain while lifting heavy patients, not a relatively trivial event as was referenced by respondent when citing *Logsdon*.[18] Additionally, claimant's current complaints include the left upper extremity at the shoulder, a portion of the body not injured during the 2008 assault. The Board finds that claimant has satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent on July 5, 2009.

K.S.A. 44-510e states in part:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[19]

Claimant contends she suffered injury to her left shoulder, cervical spine and low and middle back from the lifting activities on July 5, 2009. Respondent argues that, if claimant is entitled to any award, the extent of her physical impairment from this activity should be limited to the left upper extremity at the level of the shoulder only. When claimant first notified respondent of the accident, she complained of arm pain. When claimant went to the ER on July 27, 2009, she complained of arm pain. When claimant was being treated by Dr. Oller, only eleven days before she began working for respondent, she displayed significant ongoing pain in her cervical spine, low back and middle back. Only the left shoulder complaints were absent from the June 19, 2009, examination and treatment records of Dr. Oller.

Dr. Pratt, the independent examining physician, ordered by the ALJ, found only permanent impairment in claimant's left shoulder. No impairment ratings were given for the spine, at any level. While claimant's hired expert, Dr. Murati, found permanent

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[18] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P3d. 430 (2006).

[19] K.S.A. 44-510e(a).

impairment in claimant's left shoulder and cervical spine, he referenced no impairment in claimant's middle or low back from the accident. Additionally, the pain in claimant's cervical spine was described only as myofascial pain radiating from claimant's shoulder. Additionally, Dr. Murati's records do not appear to contain an accurate and complete history of claimant's pre-existing physical problems from the 2008 assault.

The Board finds the medical opinions of Dr. Pratt to be more persuasive than those of Dr. Murati. Claimant has proven that she suffered personal injury to her left shoulder, but not the cervical, middle or low back sections of her spine. The Award by the ALJ, finding claimant entitled to a seven percent permanent partial functional impairment to the left upper extremity at the level of the shoulder is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent, with an accident date of July 5, 2009. Claimant's award is limited to a scheduled injury based upon a seven percent permanent partial functional impairment to the left shoulder. The medical records of Dr. Pratt are included and have been considered as a part of this record.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated April 25, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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